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IN THE

Supreme Court of the United States

No. 74-677

REV. DONALD L. JACKSON,

Petitioner,

against

THE STATLER FOUNDATION, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO GRANTING CERTIORARI

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TABLE OF CONTENTS.

	PAGE
Decision Below	1
Question Presented	1
Statute Involved	2
Statement of the Case	3
Argument	5
The determination by the District Court to adhere to a prior order staying all further proceedings and refusing to hear petitioner's motion is not a final or appealable order. Dismissal by the Court of Appeals, Second Circuit for lack of jurisdiction was proper and does not warrant review by this Court	5
Conclusion	9
Petitioner's application for certiorari should be denied	9

TABLE OF CASES CITED.

Beckhardt v. National Power & Light Co., 2 Cir., 164 F. 2d 199	6
City of Morgantown v. Royal Ins. Co., 337 U.S. 254	6
Clinton Foods v. United States, 4 Cir., 188 F. 2d 289	6
International Nickel Co. v. Martin J. Berry, Inc., 204 F. 2d 583 (4th Cir., 1953)	5, 6
International Refugee Organization v. Republic S. S. Corp., 4 Cir., 189 F. 2d 858, 861	6
Jiffy Lubricator Co. v. Stewart-Warner Corp., 4 Cir., 177 F. 2d 360	6
Mottolese v. Preston, 2 Cir., 172 F. 2d 308, 309	6
Phillips v. Securities & Exchange Comm., 2 Cir., 171 F. 2d 180	6
Schoenamsgruber v. Hamburg American Line, 294 U.S. 454	6
Triangle Conduit & Cable Co., Inc. v. National Electric Products Corp., 6 Cir., 127 F. 2d 524	6

STATUTE CITED.

28 U.S.C. §§ 1291, 1292	2, 5

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Decision Below

On October 22, 1974, the United States Court of Appeals for the Second Circuit dismissed plaintiff-petitioner's appeal from the United States District Court for the Western District of New York for lack of jurisdiction.

Question Presented

Should the dismissal of an appeal by the Court of Appeals for lack of jurisdiction be reviewed where the petitioner appealed from a determination by the District Court to adhere to a prior order staying all further proceedings?

Statute Involved

28 U.S.C. § 1291:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

28 U.S.C. § 1292:

"(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court:

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property:

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed:

(4) Judgments in civil actions for patent infringement which are final except for accounting.

"(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall

so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge hereof shall so order."

Statement of the Case

This action was commenced by the plaintiff-petitioner, Rev. Donald L. Jackson, *pro se*, in the United States District Court for the District of Columbia on or about March 28, 1974, against Mario Procaccino,[1] Louis J. Lefkowitz[2] and several foundations and United States government officials.

On April 2, 1974, the District Court for the District of Columbia, *sua sponte*, transferred this case to the United States District Court for the Western District of New York.

On behalf of defendants Procaccino and Lefkowitz a motion was made for an enlargement of time in which to answer or otherwise move.[3]

Some of the other defendants moved in the District Court for the Western District of New York for dismissal of the action and the plaintiff-petitioner moved for summary judgment.

The United States District Court for the Western District of New York issued an order on May 6, 1974 which reads in part:

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[1] Commissioner of Taxation and Finance, State of New York

[2] Attorney General, State of New York.

[3] The grounds for this motion were that the plaintiff had brought at least four other actions in which he demanded the same or similar relief.

"These actions,[4] both presently pending, have almost similar allegations, parties and seek essentially the same relief. In both plaintiff alleges racial discrimination by the foundation defendants in that they refused to hire him as a director, refused to give scholarships to his children and refused money to his foundation grants. He also alleges a pattern of discriminatory employment and investment by the foundation.

* * *

"It appears to the court that there is no just or practical reason why the two lawsuits should proceed at the same time. In discretion, the motion of defense to dismiss Civil 74-185 is denied at the present time. However, any further proceedings are stayed until further order of the court, and defendants' time to answer or to move is extended until further order. Plaintiff may amend his complaint, add additional parties and allege additional facts in Civil 1971-592 as provided for in the order of March 29, 1974. Plaintiff's motion for summary judgment in Civil 74-185 denied. If plaintiff desires an extension of time to file his amended complaint in Civil 71-592, application may be made to the Court upon notice to the defendants."

Despite this order the plaintiff-petitioner noticed a motion returnable August 5, 1974 requesting the Court to

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[4] Civil Action No. 71-592 was commenced in 1971 by the plaintiff-petitioner against the defendant foundations. The action was dismissed by the District Court. Plaintiff-petitioner appealed to the United States Court of Appeals for the Second Circuit which affirmed in part, reversed in part and remanded the case to the District Court for further proceedings. On March 29, 1974, the District Court granted plaintiff-petitioner's motion for leave to amend and to add parties. Thereafter, the plaintiff-petitioner filed an amended complaint and added the following defendants: Judge William J. Regan, Hon. Mario A. Procaccino, Hon. Louis J. Lefkowitz, Hon. H. B. Mosher, Hon. George P. Shultz and Hon. Donald L. Alexander. Motions were filed by most defendants for dismissal and or summary judgment. These motions are now under consideration by the District Court.

appoint a three-judge panel to hear his case and to reverse itself on dismissal of the motion for summary judgment and grant summary judgment in his favor.

On the return date the Court advised plaintiff-petitioner that the action had been stayed and the Court was adhering to its prior order staying the action. No written order was issued by the Court.

Thereafter, the plaintiff-petitioner filed a notice of appeal to the United States Court of Appeals for the Second Circuit. His appeal was dismissed by that Court for lack of jurisdiction on October 22, 1974.

ARGUMENT

The determination by the District Court to adhere to a prior order staying all further proceedings and refusing to hear petitioner's motion is not a final or appealable order. Dismissal by the Court of Appeals, Second Circuit for lack of jurisdiction was proper and does not warrant review by this Court.

The Court of Appeals has jurisdiction to review only final orders and interlocutory orders granting or denying injunctive relief (28 U.S.C. §§ 1291, 1292).

The stay granted by the District Court[5] is neither a final order nor an interlocutory order granting or denying injunctive relief. In *International Nickel Co.* v. *Martin J. Barry, Inc.*, 204 F. 2d 583 (4th Cir., 1953), the District Court granted a stay of an action pending the outcome of a prior action instituted by the same plaintiff in the United States District Court for the Southern District of New York. At

[5] By order dated May 6, 1974

issue in both actions was the validity of a patent. In dismissing for lack of jurisdiction the appeal from the granting of the stay, the Fourth Circuit, United States Court of Appeals stated:

> "[1] We think it clear that the order staying proceeding in the case is neither a final order nor an order granting or denying an interlocutory injunction. It is merely an interlocutory order stating what the court purposes [sic] to do, which may be revoked or superseded at any time. As such, it is clearly not appealable. See City of Morgantown v. Royal Ins. Co., 337 U.S. 254, 69 S.Ct. 1067, 93 L.Ed. 1347; Schoenamsgruber v. Hamburg American Line, 294 U.S. 454, 55 S.Ct. 475, 79 L.Ed. 989; International Refugee Organization v. Republic S. S. Corp., 4 Cir., 189 F.2d 858, 861; Clinton Foods v. United States, 4 Cir., 188 F.2d 289; Jiffy Lubricator Co. v. Stewart-Warner Corp., 4 Cir., 177 F.2d 360; Triangle Conduit & Cable Co., Inc., v. National Electric Products Corp., 6 Cir., 127 F.2d 524; Beckhardt v. National Power & Light Co., 2 Cir., 164 F.2d 199; Phillips v. Securities & Exchange Comm., 2 Cir., 171 F.2d 189; Mottolese v. Preston, 2 Cir., 172 F.2d 308, 309."

Likewise, the determination by the District Court to adhere to the stay is not appealable because it is neither a final order nor an interlocutory order granting or denying injunctive relief.

As was recognized by the Court in *International Nickel Company, Inc.* v. *Martin J. Parry, Inc., supra*, 586, considerable discretion must be afforded to the District Court Judge to dispose of cases on his calendar with the least time and effort for the Court, litigants and counsel. The petitioner filed an action in December, 1971 and on March 29, 1974 was given leave to amend his complaint and to add additional defendants.

Petitioner then filed the action in the instant case involving the same issues and parties as the prior case.[6]

[6] The demand in the amended complaint in Civil Action No. 592 reads:

"WHEREFORE, the plaintiff respectfully requests the Court to award the following relief:

a. Ordering the convening of a three-judge court as required by Sections 2281 and 2282 of 28 USCS because the plaintiff and his class demand an order enjoining the grant of tax exempt status to the defendant foundations and charities.

b. Awarding to the plaintiff, Donald L. Jackson, pursuant to the provisions of 42 USCS 1983, money damages in the amount of One Hundred Fifty Thousand ($150,000.00) Dollars for loss of employment due to the acts prohibited by 42 USCS 1983 and

c. An award of money damages to the plaintiff pursuant to 42 USCS 1983 in the amount of $6,250,000.00 for loss of business due to the deprivation of his rights to obtain funds from the defendant foundations and charities for investment purposes, and

d. The sum of $10,000.00 for each member of the class as money damages against the defendant foundations and charities for violation of 42 USCS 1981, 1983 and 1985, and

e. Awarding attorney's fees pursuant to 42 USCS 2000E-5(k) in the amount of Twenty-Five Thousand ($25,000.00) Dollars against the defendant foundations or charities, and

f. A declaratory judgment declaring as a matter of law that the defendants herein have violated the Constitutional rights of the plaintiff and the class he represents, and

g. For such other and further relief as the Court may deem proper."

The demand in the complaint in Civil Action No. 73-485 reads:

"WHEREFORE, the plaintiff respectfully requests the Court to award the following relief:

a. Ordering the convening of a three-judge court as required by Sections 2281, 2282 and 2284 of 28 USCS because plaintiff demands an order enjoining defendants from depriving plaintiff the right to vote and hold office and to enjoining the grant of tax exempt status to the defendant foundations and charities.

b. Awarding to the plaintiff, Rev. Donald L. Jackson, pursuant to the provisions of 42 USCS 1983, money damages in the amount of One hundred fifty thousand ($150,000.00) Dollars for depriving plaintiff the right to vote and hold office acts prohibited by XV Amendment to United States Constitution.

(Footnote continued on following page)

It would seem illogical for both actions to continue at the same time. There was no abuse of discretion by the District Court in staying the second action pending the outcome of the first action.

Since the plaintiff-petitioner appealed from a non-appealable order, dismissal of his appeal by the Court of Appeals Second Circuit was proper and does not warrant review by this Court.

(Footnote continued from preceding page)

c. Awarding to plaintiff, Rev. Donald L. Jackson, pursuant to the provisions of 42 USCS 1983, money damages in the amount of $600,000.00 Six Hundred Thousand Dollars, from the Statler Foundation, and One Hundred Fifty Thousand ($150,000.00) for loss of employment due to the acts prohibited by 42 USCS 1983 from each of the other 12 defendant foundations or charities and

d. An award of money damages to the plaintiff pursuant to 42 USCS 1983 in the amount of $6,500,000.00 for loss of business due to the deprivation of his rights to obtain funds from the defendant foundations and charities for investment purposes, and

e. A declaratory judgment declaring as a matter of law that the defendants herein have violated the Constitutional rights of the plaintiff and

f. For such other and further relief as the Court may deem proper."

CONCLUSION

Petitioner's application for certiorari should be denied.

Dated: December 19, 1974.

Respectfully submitted,

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